Shamsul Bahri bin Musa v Public Prosecutor and another appeal

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NOS WA-42S-7–09 OF 2022 AND WA-42H-17–09 OF 2022
MUNIANDY KANNYAPPAN J
28 JANUARY 2025

Criminal Procedure — Appeal — Conviction, against — Criminal breach of trust ('CBT') under s 408 of Penal Code — Whether there was direct proof of entrustment of property with accused — Whether there was dishonest intention by accused when committing offence — Whether manner by which CBT was committed expressly stipulated in charge — Whether accused was prejudiced — Whether conviction safe — Whether there was gap in prosecution's case

Criminal Procedure — Sentence — Adequacy of sentence — Section 408 of Penal Code — Criminal breach of trust ('CBT') — Whether ingredients of offence satisfied — Whether sessions court judge ('SCJ') considered defence of accused — Whether there was misdirection by SCJ — Whether sentence imposed on accused inadequate

Criminal Law — Penal Code — Section 408 — Criminal breach of trust ('CBT') — Whether charges against accused properly framed — Whether charged failed to stipulate mode by which offence was committed — Whether charge mens rea and actus reus of offence specified in charge — Whether preferred charges disclosed that accused was actuated by dishonest intention when committing offence — Whether accused able to negate principal ingredient of offence of CBT — Whether accused prejudiced

The accused held the position of *Penolong Pengurus Besar Operasi Kewangan* at Telekom Sales & Service Sdn Bhd ('TSSB'). It was alleged that there was movement of monies belonging to TSSB into the personal account of the accused and his wife. Subsequently, the accused was charged with four charges for offences of criminal breach of trust ('CBT') under s 408 of the Penal Code ('the PC') at the sessions court. On the dates specified in the preferred charges, transfer of monies took place via desktop banking, wherein there would be one special computer operated by a 'preparer.' It was in evidence that the said 'preparer' would prepare a working paper for the purpose of transfer and hand it over to the 'checker' and the checker would then obtain a token number via desktop banking which would be given to the 'approver,' the person in authority. It was alleged that one Siti Zahidah Ayob was the

'preparer', and the accused was the 'checker'. In his defence, the accused alleged that: (a) TSSB was an entity that was in charge of supervision of the telecom shop called TM Point; (b) at the time of the alleged transaction, which formed the subject matter of charges against the accused, TM Point was allowed to collect 'billing' from Astro and Celcom; and (c) all collections would be entered into the sales account of TSSB, opened specifically for Astro and Celcom. Accordingly, the accused's special functions included third party billing and his job scope was to transfer funds to Astro twice a week. The checking was done by him via a special computer which was used to access Sistem Rentas for the purpose of transfer of a bigger amount, maximum up to RM499,999.99. There were only two accounts in the Sistem Rentas, which was Astro and Celcom. Transfer to any other account, would be rejected by the system. Hence, it was argued that his account and his wife's account were definitely not included into the system, were unrelated to the process of transfer of funds and had no link or nexus with the alleged transactions as specified in the preferred charges against him. Further, the accused also maintained that he was: (i) not an 'approver' and he did not receive any device or token to be in his possession; (ii) aware of monies transferred into his account which did not correspond with the transactions which he had undertaken, that he did not transfer the monies into his own account and did not know the source of those funds; and (iii) not entrusted with nor had dominion over the funds or monies belonging to TSSB or the funds or monies due to Astro, and was not in the position of disposing of the property belonging to TSSB due to Astro to himself and his wife. At the end of the case of the prosecution, the sessions court judge ('SCJ1') acquitted and discharged the accused. The SCJ1's decision was affirmed by the High Court. Upon an appeal by the prosecution to the Court of Appeal ('COA'), the COA set aside the order of acquittal and discharge and ordered the accused to enter on his defence. Consequent to that, the sessions court judge ('SCJ2') heard the defence of the accused, and found the accused guilty, convicted and sentenced him to a period of two years imprisonment. Against the decision of the SCJ2, two appeals arose, namely: (1) an appeal by the accused, against the finding of guilt and conviction entered; and (2) an appeal by the prosecution, against the inadequacy of the sentence meted out by the SCJ2.

Held, allowing the appeal of accused; dismissing the appeal of prosecution:

(1) The charges were incomplete as the mens rea of the offence committed as well as the requisite actus reus of the offence were not specified. The mode of entrustment, which was a material ingredient of an offence of CBT and also a legal condition to be fulfilled was not specified and the manner in which he was entrusted with the impugned property in his capacity as a clerk or servant, pursuant to s 408 of the PC was also unfulfilled both in terms of the charges and evidence. In proving the offence of CBT under s 408 of the PC, it was mandatory for the prosecution to prove beyond reasonable doubt three principal ingredients, which were entrustment or

dominion, the misappropriation and dishonest intention. In the present case, the preferred charges itself did not disclose that the accused was actuated by dishonest intention when committing the alleged offences of CBT as for the transactions specified. In the absence of salient stipulations in the preferred charges, the accused was prejudiced, as he was unable to answer adequately to negate the principal ingredient of the offence of CBT, that he was not the person who was entrusted with the alleged impugned property or dominion over it (see paras 30–31).

(2) The preferred charges lack foundation in law and unsupported by credible evidence by prosecution. Considering the evidence led by prosecution and the accused and juxtaposing it against the charges preferred against him, amongst the logical conclusions that could be arrived at by SCJ2 was that as the proof of the primary ingredient of entrustment was lacking, the offence of CBT was not constituted. Hence, the prosecution had failed to prove a case beyond reasonable doubt against the accused person on all the charges, which were flawed per se (see paras 32–33).

(3) The SCJ2 had formed her mind to convict the accused on the plank that the monies had entered into his account and his wife's without probing further that the said monies did not form the transactions which were stipulated as subject matter of the preferred charges. That amounted to a misdirection which had prejudiced the accused a great deal occasioning a failure of justice. Further, the SCJ2 did not consider the defence of the accused against the preferred charges against the accused. Hence, the SCJ2 had misdirected herself on the facts, circumstances of the case and the law applicable and yet, found the accused guilty, convicted and sentenced him. Thus, the conviction of the accused was unsafe and erroneously made (see para 34).

(4) There had been insufficient judicial appreciation of the evidence of facts and circumstances placed before SCJ2. SCJ2 had completely overlooked the stark fact that the course of events did not occur in the manner she had evaluated the evidence of the defence, as she did not juxtapose it with the evidence of the prosecution. In that respect, there had been a flawed reasoning by her springing from the established facts and evidence tendered by both the prosecution and defence. She had also fundamentally misdirected herself when she had erred in not scrutinising the charges preferred and consider it carefully in terms of the law pertaining an offence of CBT, but instead went ahead to conclude it did correspond with ss 405 and 408 of the PC (see para 36).

(5) The requisite provisions of the Criminal Procedure Code, including s 154 had not been complied with, in order for the accused to understand the accusations against him and to explain the preferred charges against him and afford an answer. Notwithstanding the plausible explanation

given by the accused which was supported by testimony of the prosecution witnesses, creating a reasonable doubt both on the case of prosecution and his guilt, SCJ2 found otherwise. Considering his explanation, the accused had discharged the onus placed on him, to have raised a reasonable doubt. It was glaring that SCJ2 did not pay heed to the presumption of innocence which operates in favour of the accused and that he was entitled to the benefit of any doubt, which remained overwhelming (see para 36).

(6) Resulting from the infirmities in the findings by SCJ2, miscarriage of justice had occasioned, hence the appellate intervention. Ensuing from that, the finding of guilty made, conviction entered against the accused and sentence meted out on the accused was set aside, and the accused was acquitted and discharged of the charges against him. Following from that, appeal by the prosecution/appellant against the sentence meted out on the accused/respondent was also dismissed (see para 37).

[Bahasa Malaysia summary

Tertuduh memegang jawatan sebagai Penolong Pengurus Besar Operasi Kewangan di Telekom Sales & Service Sdn Bhd ('TSSB'). Setelah didapati terdapat pemindahan wang milik TSSB ke dalam akaun peribadi tertuduh dan isterinya, tertuduh didakwa dengan empat pertuduhan atas kesalahan pecah amanah jenayah ('CBT') di bawah s 408 Kanun Keseksaan ('KK') di mahkamah sesyen. Pada tarikh yang dinyatakan dalam pertuduhan, pemindahan wang berlaku melalui perbankan komputer meja, di mana terdapat satu komputer khas yang dikendalikan oleh 'penyedia.' 'Penyedia' tersebut akan menyediakan dokumentasi untuk tujuan pemindahan dan menyerahkan kepada 'penyemak' yang kemudiannya akan memperoleh nombor token melalui perbankan komputer meja yang akan diberikan kepada 'pelulus' yang merupakan orang yang mempunyai autoriti. Siti Zahidah Ayob didakwa merupakan seorang 'penyedia' dan tertuduh merupakan seorang 'penyemak'. Dalam pembelaannya, tertuduh mendakwa bahawa: (a) TSSB adalah entiti yang bertanggungjawab menyelia kedai telekomunikasi TM Point; (b) pada masa transaksi yang didakwa yang menjadi subjek pertuduhan terhadap tertuduh, TM Point dibenarkan mengutip bayaran 'bil' daripada Astro dan Celcom; dan (c) semua koleksi akan dimasukkan ke dalam akaun jualan TSSB dibuka khusus untuk Astro dan Celcom. Oleh itu, fungsi khas tertuduh termasuk pengebilan pihak ketiga dan skop tugasnya adalah untuk memindahkan dana kepada Astro sebanyak dua kali seminggu. Semakan dilakukan melalui komputer khas yang digunakan untuk mengakses Sistem Rentas bagi tujuan pemindahan jumlah yang lebih besar iaitu maksimum sehingga RM499,999.99. Terdapat dua akaun sahaja dalam Sistem Rentas, iaitu Astro dan Celcom. Pemindahan ke mana-mana akaun lain akan ditolak oleh sistem. Oleh itu, dihujahkan bahawa akaunnya dan akaun isterinya tiada di dalam sistem, tidak berkaitan dengan proses pemindahan dana dan tidak

mempunyai kaitan dengan transaksi yang didakwa seperti yang dinyatakan dalam pertuduhan terhadapnya. Selanjutnya, tertuduh juga menegaskan bahawa dia: (i) bukanlah 'pelulus' dan dia tidak menerima sebarang peranti atau token untuk dimilikinya; (ii) menyedari wang yang dipindahkan ke dalam akaunnya yang tidak sepadan dengan urus niaga yang telah dilakukannya, dia tidak memindahkan wang itu ke dalam akaunnya sendiri dan tidak mengetahui sumber dana tersebut; dan (iii) dia dan isterinya tidak diamanahkan atau mempunyai kuasa ke atas dana atau wang milik TSSB atau dana atau wang yang perlu dibayar kepada Astro dan tidak mempunyai kuasa memindahkan wang TSSB yang berhutang kepada Astro. Pada akhir kes pendakwaan, hakim mahkamah sesyen ('HMS1') melepaskan dan membebaskan tertuduh. Keputusan HMS1 telah dikekalkan oleh Mahkamah Tinggi. Selepas rayuan pihak pendakwaan ke Mahkamah Rayuan ('MR'), MR mengenepikan perintah melepas dan membebaskan tertuduh dan memerintahkan tertuduh untuk membela diri. Setelah hakim mahkamah sesyen ('HMS2') mendengar pembelaan tertuduh, HMS2 telah mensabitkan tertuduh dan menjatuhkan hukuman penjara selama dua tahun. Rayuan terhadap keputusan HMS2 adalah mengenai dua perkara: (1) rayuan oleh tertuduh terhadap keputusan sabitan bersalah; dan (2) rayuan oleh pihak pendakwaan terhadap hukuman yang dijatuhkan oleh HMS2 tidak mencukupi.

Diputuskan, membenarkan rayuan tertuduh; mengenepikan rayuan pendakwaan:

(1) Pertuduhan-pertuduhan tersebut tidak lengkap kerana mens rea dan actus reus kesalahan tidak dinyatakan. Cara harta yang diamanahkan yang merupakan perkara terpenting kesalahan CBT dan juga syarat undang-undang yang perlu dipenuhi tidak dinyatakan dan cara harta yang dipertikaikan tersebut diamanahkan kepadanya dalam kapasitinya sebagai kerani atau pekerja, menurut s 408 KK juga tidak dipenuhi dari segi pertuduhan dan keterangan. Dalam membuktikan kesalahan CBT di bawah s 408 KK, adalah wajib bagi pihak pendakwaan untuk membuktikan di luar keraguan munasabah tiga bahan utama, iaitu amanah atau kawalan, penyelewengan dan niat tidak jujur. Dalam kes ini, pertuduhan-pertuduhan itu sendiri tidak mendedahkan bahawa tertuduh mempunyai niat tidak jujur ketika melakukan kesalahan CBT seperti yang didakwa seperti transaksi yang dinyatakan. Dengan ketiadaan elemen yang tepat dalam pertuduhan tersebut, tertuduh telah diprejudiskan kerana dia tidak dapat menjawab dengan secukupnya untuk membela diri terhadap elemen penting untuk kesalahan CBT, iaitu dia bukan orang yang diamanahkan dengan harta atau kawalan terhadap harta tersebut (lihat perenggan 30–31).

(2) Pertuduhan-pertuduhan tersebut tidak mempunyai asas dalam undang-undang dan tidak disokong oleh keterangan yang boleh

dipercayai oleh pendakwaan. Memandangkan keterangan yang dikemukakan oleh pihak pendakwaan dan tertuduh dan seiring dengan pertuduhan terhadapnya, antara kesimpulan paling logik yang boleh difikirkan oleh HMS2 adalah keterangan elemen utama Amanah adalah tidak kuat dan kesalahan CBT tidak berjaya dibuktikan. Oleh itu, pihak pendakwaan telah gagal membuktikan kes di luar keraguan munasabah terhadap tertuduh atas semua pertuduhan dan ianya tidak boleh dipertahankan sama sekali (lihat perenggan 32–33).

(3) HMS2 telah mensabitkan tertuduh dengan alasan bahawa wang itu telah dimasukkan ke dalam akaunnya dan isterinya tanpa menyiasat lebih lanjut bahawa wang tersebut tidak membentuk urus niaga yang ditetapkan sebagai perkara asas pertuduhan tersebut. Hal ini merupakan salah arah yang menjejaskan tertuduh yang menyebabkan kegagalan keadilan. Selanjutnya, HMS2 tidak mempertimbangkan pembelaan tertuduh terhadap pertuduhan terhadap tertuduh. Oleh itu, HMS2 telah terkhilaf mengenai fakta, keadaan kes dan undang-undang yang terpakai. Namun, beliau tetap mensabitkan tertuduhan dan menjatuhkan hukuman terhadapnya. Oleh itu, sabitan tertuduh adalah tidak selamat dan tersalah arah (lihat perenggan 34).

(4) Terdapat penilaian kehakiman yang tidak mencukupi terhadap keterangan fakta dan keadaan yang dikemukakan di hadapan HMS2. HMS2 telah mengabaikan sepenuhnya fakta bahawa transaksi tersebut tidak berlaku menurut keterangan pembelaan yang gagal dinilai dan tidak membandingkannya dengan keterangan pendakwaan. Dalam hal itu, terdapat alasan yang salah oleh beliau yang berpunca daripada fakta dan bukti yang ditetapkan oleh kedua-dua pihak pendakwaan dan pembelaan. Beliau juga pada asasnya telah tersilap arah apabila telah terkhilaf dengan tidak meneliti pertuduhan dan mempertimbangkannya dengan teliti dari segi undang-undang yang berkaitan dengan kesalahan CBT, tetapi sebaliknya memutuskannya kesalahan ss 405 dan 408 KK berjaya dibuktikan (lihat perenggan 36).

(5) Peruntukan penting dalam Kanun Tatacara Jenayah, termasuk s 154 tidak dipatuhi, agar tertuduh memahami tuduhan terhadapnya dan menjelaskan pertuduhan yang dikenakan terhadapnya dan memberikan justifikasi. Walaupun penjelasan munasabah yang diberikan oleh tertuduh yang disokong oleh keterangan saksi pendakwaan dan berjaya mewujudkan keraguan munasabah mengenai kes pendakwaan dan kesalahannya, HMS2 memutuskan sebaliknya. Memandangkan terdapat justifikasi, tertuduh telah menunaikan tanggungjawabnya untuk menimbulkan keraguan yang munasabah. Adalah jelas bahawa HMS2 tidak memberi perhatian kepada anggapan tidak bersalah yang memihak kepada tertuduh dan dia berhak mendapat manfaat daripada sebarang keraguan yang jelas sekali terbukti (lihat perenggan 36).

(6) Hasil daripada kelemahan penemuan oleh HMS2, kesilapan keadilan telah berlaku. Oleh itu campur tangan rayuan ini dibenarkan. Berikutan itu, dapatan bersalah dan sabitan terhadap tertuduh berserta hukuman yang dikenakan ke atas tertuduh diketepikan dan tertuduh dilepaskan dan dibebaskan daripada pertuduhan tersebut. Oleh itu, rayuan oleh pihak pendakwaan/perayu terhadap hukuman yang dikenakan ke atas tertuduh/responden juga ditolak (lihat perenggan 37).]

Cases referred to

Balachandran v PP [2005] 2 MLJ 301, FC (refd)
Chia Han Kiat v Rex [1937] 1 MLJ 261 (refd)
Dato' Sri Mohd Najib bin Hj Abd Razak v PP [2021] MLJU 2485; [2022] 1 CLJ 491, CA (refd)
Goh Ah San & Ors v R [1938] MLJ 95, HC (refd)
Lim Kheak Teong v PP [1985] 1 MLJ 38, FC (refd)
Pendakwa Raya v Sanin bin Othman [2010] MLJU 1283, CA (refd)
Periasamy s/o Sinnappan & Anor v PP [1996] 2 MLJ 557, CA (refd)
Puspa Kumar Rai v State of Sikkim [1978] Cri LJ 1379, HC (refd)
Tan Liang Chew & Ors v PP [1997] 5 MLJ 338, HC (refd)
VR Dalal & Ors v Yougendra Naranji Thakkar & Anr (2008) 15 SCC 625, SC (refd)

Legislation referred to

Criminal Procedure Code ss 152(5), 153(1), 154, 173(m)(i)
Evidence Act 1950 s 114(g)
Penal Code ss 24, 405, 408, 409B

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Zaileen Nadia Zubir (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Muniandy Kannyappan J:

PREFACE

[1] After having perused the record of appeal and submission advanced by both counsel for appellant/accused as well as the deputy public prosecutor ('DPP') appearing for the prosecution/respondent, the following ensues.

[2] This case has come before the High Court twice, once when the accused was acquitted and discharged of the preferred charges against him at end of the case of prosecution by sessions court judge ('SCJ1') and now when he was convicted at end of the case of defence and sentenced according to law by sessions court judge 2 ('SCJ2').

[3] There was an appeal lodged by the prosecution to the Court of Appeal ('COA') against the decision of the High Court affirming decision of SCJ1 who had acquitted and discharged the accused of the charges against him at end of the case of prosecution. The COA had set aside the order of acquittal and discharge and ordered the accused to enter on his defence. Consequent to that SCJ2 heard the defence of the accused, and found the accused guilty, convicted and sentenced him to a period of two years imprisonment.

[4] Against that decision, both the accused and prosecution have appealed to this court; one in respect of the finding of guilty made and conviction entered and another against the sentence meted out, contended to be inadequate.

DUTY OF THE TRIAL JUDGE

[5] In view of circumstances of the case, the position of law is well settled, wherein SCJ2 could only decide on the fate of the accused after having considered and evaluated the evidence led by the accused juxtaposed with the evidence tendered by the prosecution at the prosecution stage of the case. On conclusion of trial, SCJ2 ought to have considered, scrutinised and evaluated *all the evidence* tendered in the case against the accused pursuant to s 173(m)(i) of the Criminal Procedure Code ('the CPC'/Act 593) which provides:

> At the conclusion of the trial, the Court shall consider *all the evidence adduced* before it and shall decide whether the prosecution has proved its case beyond reasonable doubt. (Emphasis is mine.)

To reiterate, all the evidence adduced would include the testimony of the accused juxtaposed with the evidence tendered during the case of prosecution. It is also salutary for SCJ2, when evaluating all the evidence, to also make a pointed reference to the charges preferred against the accused and conclude if the proof beyond reasonable doubt of the said charges is in fact and law supported by all the evidence tendered. Reference to the preferred charges would also include, if it is framed in accordance with the law stipulating the offence, which in the present case, is an offence of criminal breach of trust ('CBT') pursuant to s 408 of the Penal Code ('the PC'/Act 574) read together with s 405 of the same Code, defining the said offence.

[6] The entrenched position of law is fortified by authorities, inter alia, *Pendakwa Raya v Sanin bin Othman* [2010] MLJU 1283, where the COA had decided when defence is directed to be called by an appeal court the trial judge must accept that a prima facie case has been proven. It is as if the defence was called by the learned judge himself. *Only after he has gauged the total evidence adduced, inclusive of all the evidence adduced at the prosecution's stage and tested as against the defence evidence, may the fate of the accused person be decided by the*

court. In short there has to be a maximum evaluation of the whole evidence at the close of the defence.

[7] The pivotal issue thus, did SCJ2 do so? On the face of it, is apparent that she did not do so, as she took an extremely cautious view that since the COA has ordered for her to hear defence of the accused, she has no other alternative but to only consider the said defence, if it had the effect of dislodging the case of prosecution with a reasonable doubt on the proven case by prosecution and guilt of the accused person. Obviously, she did not embark on a curial scrutiny of the preferred charges against the accused when evaluating defence of the accused and juxtaposing it with the entire case of the prosecution. In fact, upon scrutinising her findings, it is so clear that she did not evaluate the case of defence with the evidence tendered by the prosecution.

MISDIRECTION BY THE TRIAL JUDGE

[8] In the present case, SCJ2 had taken a swift way out by considering only defence of the accused, and arriving at a finding that the prosecution has proven a case beyond reasonable doubt against him, or in other words, the accused was unable to raise a reasonable doubt on the case of prosecution or his guilt, thus finding him guilty, convicted and sentenced him accordingly. When I say a swift approach taken, it is meant, she had only considered the fact that since the funds or monies of the entity Telekom Sales and Services Sdn Bhd ('TSSB'), in which the accused was employed, has gone into his personal account and his wife, therefore it culminates into an offence of CBT. Thus, any negation, explanation or defence raised by the accused would be unable to thwart and disprove the preferred charges against him.

[9] That conclusion arrived at is in stark contrast with the preferred charges against the accused which are for offences of CBT. For the offence of CBT to be constituted, there has to be direct proof of entrustment of property with the accused person; dishonest intention by him when committing the offence and the manner by which CBT was committed has to be expressly stipulated in the charge, which may be one of the four modes referred to in s 405 of the PC.

[10] SCJ2 ought to have borne in mind that the allegation against the accused is not that he has committed criminal misappropriation of property ('CMP') per se, but CBT. The two offences are different in its nature and character, thus necessitating different types of proof in law. Since SCJ2 did not appreciate the said salient differences, she has misdirected herself seriously on the law pertaining an offence of CBT. It too flies across the law as stated by our apex court in the case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, that a trial judge must undertake a maximum evaluation exercise at the end of the prosecution *and again at the defence stage*. Bereft of that, the accused

deserves an acquittal, especially in this case when SCJ2 has seriously misdirected herself on the law pertaining the offence of CBT juxtapose with the preferred charges against the accused.

THE PREFERRED CHARGES

[11] The prosecution in this case, chose to prefer charges of CBT against the accused. Thus, its bounden duty in law is to tender tangible and appropriate proof, as required to meet the ingredients of said offence. To reiterate, the movement of monies belonging to TSSB into the personal account of the accused and his wife, is not the only issue to be decided, as the charges are for an offence of CBT and not CMP. Moreover, it is unearthed by evidence tendered by the prosecution that, monies went into the personal account of the accused and his wife casually with no overt act or conduct of the accused. The law only dictates that he has to enquire on the source of the funds into his account upon receiving it and he is bound to do that, if the offence for which he is charged is for CMP. In any event, it is contended by counsel for the accused that the accused has been sued for return of the said monies in the civil court, which was not refuted by the prosecution.

[12] A case beyond reasonable doubt is only proven by the prosecution if the proffered evidence constitutes the ingredients of the offence of CBT as reflected by the preferred charges against the accused. If the charges are improperly framed and it does not meet the stipulations of law as necessitated by ss 405 and 408 of the PC, and the tendered evidence by the prosecution is opposed to the required ingredients, the only alternative for the trial judge is to acquit the accused and not otherwise. The charges against the accused for the offence of CBT are improperly framed. The offence of CBT is not disclosed by the said charges as it does not conform to the legal provisions found in the CPC, rendering the charges to be illegal and the trial to be a nullity. The specific provisions in the CPC which has not been complied with are ss 152(5), 153(1) and 154 of the CPC, which provides the following:

> 152 (5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in a particular case.
>
> 153 (1) The charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as reasonably sufficient to give the accused notice of the matter with which he is charged.
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> 154 When the nature of the case is such that the particulars mentioned in sections 152 and 153 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

[13] For sake of completeness, the four charges preferred against the accused which are for offences of CBT by a clerk or a servant under s 408 of the PC, are as follows:

> Barang siapa, yang menjadi seorang kerani atau orang gaji, yang bekerja sebagai seorang kerani atau orang gaji dan yang, dengan apa-apa cara telah diamanahkan atas sifatnya itu dengan harta, atau dengan apa-apa kuasa atas harta, melakukan pecah amanah jenayah mengenai harta itu hendaklah dihukum dengan pemenjaraan selama tempoh tidak kurang dari satu tahun dan tidak lebih dari empat belas tahun dan dengan sebat dan hendaklah juga dikenakan denda.

CBT is defined under s 405 of the PC, as follows:

> Barang siapa, yang dengan apa-apa cara telah diamanahkan dengan harta samada sendirian atau bersesama dengan mana-mana orang lain, atau dengan apa-apa kuasa atas harta, secara tidak jujur menyalahgunakan harta itu atau menjadikannya bagi kegunaannya sendiri atau secara tidak jujur menggunakan atau melepaskan harta itu dengan melanggar apa-apa arahan undang-undang yang menetapkan cara bagaimana amanah itu kena disempurnakan atau apa-apa kontrak disisi undang-undang yang nyata atau yang disifatkan ada yang dia telah buat mengenai penyempurnaan amanah itu atau dengan bersengaja membiarkan mana-mana orang lain berbuat demikian itu adalah melakukan pecah amanah jenayah.

As above, ingredients of the offence of CBT to be expressly stipulated in the preferred charges and to be proven beyond reasonable doubt by the prosecution are:

(a) the legal condition of entrustment of property or dominion over the property by accused;

(b) dishonest intention of the accused when committing the offence of CBT;

(c) since the offences alleged to have been committed by the accused is under s 408 of the PC, it has to be stated if the accused person was a clerk or servant at TSSB or employed as such, when the crime was committed. It has to be in that capacity he was either entrusted with the impugned property being the subject matter of the offence or dominion over the said property; and

(d) further, one of the four modes by which the accused had committed the offence of CBT must also be stated in the charges, as that would be actus reus of the crime. The modes are:

(i) misappropriation of the impugned property;

(ii) conversion to own use of the impugned property;

(iii) use or disposal of the impugned property in violation of any direction of

law, express or implied legal contract prescribing the mode in which such trust is to be discharged, which he has made touching the discharge of such trust; or

(iv) wilfully suffers any other person to do so.

[14] The preferred charges in its original form reads as:

PERTUDUHAN PERTAMA

Bahawa kamu, pada 28/12/2007 di 18th Floor, Menara Mutiara Bangsar, Jalan Liku, Off Jalan Riong, di dalam daerah Brickfields di dalam Wilayah Persekutuan Kuala Lumpur, sebagai Penolong Pengurus Besar Operasi Kewangan di Telekom Sales & Service Sdn Bhd yang telah diamanahkan dengan harta iaitu wang milik syarikat berjumlah RM53,124.25, telah melakukan pecah amanah ke atas harta tersebut, dengan itu kamu telah melakukan kesalahan di bawah seksyen 408 Kanun Keseksaan dan boleh dihukum di bawah seksyen yang sama ...

PERTUDUHAN KEDUA

Bahawa kamu, pada 8/4/2008 sehingga 24/12/2008 di 18th Floor, Menara Mutiara Bangsar, Jalan Liku, Off Jalan Riong, di dalam daerah Brickfields di dalam Wilayah Persekutuan Kuala Lumpur, sebagai Penolong Pengurus Besar Operasi Kewangan di Telekom Sales & Service Sdn Bhd yang telah diamanahkan dengan harta iaitu wang milik syarikat berjumlah RM254,992.62 telah melakukan pecah amanah ke atas harta tersebut, dengan itu kamu telah melakukan kesalahan di bawah seksyen 408 Kanun Keseksaan dan boleh dihukum di bawah seksyen yang sama ...

PERTUDUHAN KETIGA

Bahawa kamu, pada 5/1/2009 sehingga 4/12/2009 di 18th Floor, Menara Mutiara Bangsar, Jalan Liku, Off Jalan Riong, di dalam daerah Brickfields di dalam Wilayah Persekutuan Kuala Lumpur, sebagai Penolong Pengurus Besar Operasi Kewangan di Telekom Sales & Service Sdn Bhd yang telah diamanahkan dengan harta iaitu wang milik syarikat berjumlah RM1,040,119.38 telah melakukan pecah amanah ke atas harta tersebut, dengan itu kamu telah melakukan kesalahan di bawah seksyen 408 Kanun Keseksaan dan boleh dihukum di bawah seksyen yang sama ...

PERTUDUHAN KEEMPAT

Bahawa kamu, pada 28/1/2010 sehingga 29/9/2010 di 18th Floor, Menara Mutiara Bangsar, Jalan Liku, Off Jalan Riong, di dalam daerah Brickfields di dalam Wilayah Persekutuan Kuala Lumpur, sebagai Penolong Pengurus Besar Operasi Kewangan di Telekom Sales & Service Sdn Bhd yang telah diamanahkan dengan harta iaitu wang milik syarikat berjumlah RM176,901.25, telah melakukan pecah amanah ke atas harta tersebut, dengan itu kamu telah melakukan kesalahan di bawah seksyen 408 Kanun Keseksaan dan boleh dihukum di bawah seksyen yang sama ...

Scrutinising the above charges, the following are revealed:

(a) the mode by which the offence of CBT was committed is not stipulated. That *per se* contravenes s 154 of the CPC. So actus reus of the crime not revealed;

(b) if the offences were committed by dishonest intention of the accused is also not revealed. It is so required by s 405 read with s 24 of the PC. So, mens rea of the offence is also not revealed;

(c) the legal condition if the accused was entrusted with the impugned property or dominion over the impugned property is also not revealed, thus contravening s 152(5) of the CPC; and

(d) capacity of the accused, if he was a clerk or servant of TSSB or employed as such is also not revealed.

Save for the above fundamentals, disclosed in the preferred charges are:

(i) that between dates 28 January 2010 to 29 September 2010 at 18th Floor, Menara Mutiara Bangsar, Jalan Liku, Off Jalan Riong, Kuala Lumpur;

(ii) as Penolong Pengurus Besar Operasi Kewangan di Telekom Sales & Service Sdn Bhd ('TSSB');

(iii) was entrusted with the property of the company (the various amounts);

(iv) did commit breach of trust of the said property; and

(v) as such he is to have committed an offence under s 408 of the PC, punishable under the same section.

Failure by the prosecution to only state the above, without stipulating the requisites of the offence of CBT, has in fact prejudiced the accused, as he is left to guess the mode by which the alleged offences are committed. It is apparent that the charges lack the constituents of a crime, which is the actus reus and mens rea. The legal condition on the manner by which the accused was entrusted with the property or dominion over the property is absent in the charges. The accused is said to have only committed 'breach of trust' and not 'criminal breach of trust' necessitating a criminal trial. Further as the *Penolong Pengurus Besar Operasi Kewangan* at Telekom Sales & Service Sdn Bhd ('TSSB'), was he a clerk or servant of TSSB or employed in that capacity. Was the entrustment of the impugned property in his capacity as a clerk or servant as required for an offence under s 408 of the PC. It is all left to be guessed by the accused. Not only the charges are flawed, but the tendered evidence by prosecution also lacks proof of the material ingredients.

A EVIDENCE ON RECORD

[15] Evidence tendered by the prosecution, which was refuted by the accused via his counsel through vehement cross-examination, demonstrates that:

B

(a) on the dates specified in the preferred charges, transfer of monies took place via desktop banking, wherein there would be one special computer operated by a 'preparer';

C (b) the said 'preparer' would prepare a working paper for the purpose of transfer and hand it over to the 'checker';

(c) the 'checker' then would obtain a token number via desktop banking;

(d) the token number would be given to the 'approver';

D (e) the 'approver' then would enter the said number into one device which resembles a small or mini calculator;

(f) the said device would generate a new token number and the 'preparer' and 'checker' would be utilising the said pin in order to carry out the

E transfer at the desktop banking computer and the monies would be transferred to Astro;

(g) the 'preparer', 'checker' and 'approver' are entirely different individuals and the 'approver' would only be amongst a person in authority;

F (h) without the token, the desktop banking could not be operated and any one person who does not have access to the token, could not carry out any transaction;

(i) exh D82 shows one Siti Zahidah bt Ayob was the 'preparer', and the accused was the 'checker'. The details or particulars in D82 was prepared

G by the 'preparer'.

(j) the document in the form of D82 would be taken to the 'approver' for him or her to generate a token. In order to generate the token, a unique authorisation ID would be necessary;

H (k) SP2 agrees that before obtaining the token, the 'approver' has to confirm the details or particulars in D82 are correct;

(l) then SP4 would check on the agency to which the monies would be transferred with regard to all transactions given by the accused for

I approval. This is because, if the monies are transferred to another account, the name of the 'payee' would appear as the account owner;

(m) SP2 too agrees that a print out would be generated showing a successful transaction. If the monies go into another account, a print out would still be generated;

(n) SP4 confirms in her testimony that for desktop banking, it starts with the 'preparer'. Pursuant to D82, the 'preparer' is Siti Zahidah. The account number of the payor and account to which payment has to be made would appear on a piece of paper which has to be given to Siti Zahidah. A supporting document would have also to be annexed as proof of payment;

(o) after the 'preparer' prepares the working paper, it would be checked by a 'checker', who was the accused according to D82;

(p) SP4 testified that the role of the accused was to see SP4 to obtain a token *as he was not the 'approver'*;

(q) after the desktop banking system generates the document D82 and a random number, the accused would bring along the number to SP4, who would then enter the said number into the device, which would generate a token;

(r) SP4 agreed that if there is a change in the transaction involving the transfer, the token cannot be used for the varied transaction;

(s) SP4 also agrees that the desktop banking system is controlled by the IT division and for purpose of variation of data or account number as specified in the system, there has to be approval from the IT division;

(t) SP4 also confirmed when asked by the court that the device is kept by her in her drawer which was locked. It was only herself who knows of the ID and password for the said device;

(u) when the list of 'approver' from Maybank as in D80 was referred, the name of the accused *was not listed* as one; and

(v) he is also not listed as 'authoriser'; thus, he was not in possession of a device or password in order to access to the said device.

[16] Notwithstanding the preferred charges, scrutinising the evidence tendered by prosecution, it is apparent that there has been no entrustment of the funds or monies of TSSB (impugned property) or dominion over it, to the accused. Pursuant to the above trail of evidence, it is proved that from the point of inception of the process of transfer of monies to Astro, relied on by the prosecution as its narrative, does not at all involve the accused as an approver of funds. He was merely the checker. Viewing the charges, in terms of the place specified, the impugned property seems to be residing at Maybank and not with TSSB or the accused. Beyond doubt, the accused was only involved in the preparation of the relevant documents and checking it subsequently for the ultimate purpose of approval by the approver in order to approve payments to be made to Astro. The approver was in fact SP4. The accused too was not signatory to the said account, to sign of the funds of TSSB. Documentary evidence D80 and D82 lends proof to this. Those documents are

contemporaneous and of high probative value which are generated by the system in the course of the process of transfer of funds due to Astro.

DEFENCE VERSION

[17] The accused chose to testify from the witness box as SD1. He said this under oath which was hardly refuted by the prosecution, simply because the work process involved in the transfer of monies to Astro is also as narrated by the witnesses for the prosecution, which was chosen not to be considered and evaluated by way of juxtaposition by SCJ2.

(a) TSSB is an entity that is in charge of supervision of telecom shop called TM point;

(b) at time of the alleged transaction which forms subject matter of charges against him, TM point was allowed to collect "billing" from Astro and Celcom. At end of the working day, after balancing exercise of accounts, all collections would be entered into the sales account of TSSB, opened specifically for Astro and Celcom;

(c) his job scope at office at the material time was to transfer funds to Astro twice a week, usually on Tuesdays and Thursdays. He was only in charge of Astro account;

(d) in the year 2007, he was appointed as *Penolong Pengurus Stok dan Tugas-Tugas khas.* His special functions include third party billing;

(e) then on 15 July 2009, he was holding position as *Memangku Penolong Pengurus Besar Operasi Kewangan,* until 15 July 2010. He was then transferred to the Business Development Unit;

(f) according to him, SP6 would extract from the TSSB system all bills paid at each and every TM point. She will then convert the data (of all TM point) into an excel format. She then issues a 'cover letter' which contains the date and time of transaction and amount need to be transferred. The document prepared is akin to D82;

(g) SP6 is considered as the document preparer and she prepares document like D82 for each transaction, save for the last four pages;

(h) there is no similar document like D82 tendered in court by the prosecution for each of the four preferred charges. Hence, a missing link occurs in the prosecution narrative;

(i) after preparing the document like D82, she would pass to him for confirmation;

(j) he would then check all transactions with the *Sistem Rentas* to know the balance amount at TSSB which is opened specifically for Astro, to see if the funds are sufficient for transfer;

(k) the signature column 'checked' at D82 is his. If the amount is sufficient, he would check for transfer of funds as per D82 to Astro;

(l) the checking is done by him via a special computer which is used to access *Sistem Rentas.* From that computer, he would only be able to view the balance, based on which he would prepare a notice of transfer of funds to Astro before approval by the approver or approving authority;

(m) the checking and notice of transfer could only be undertaken via the special computer. *Sistem Rentas* is for the purpose of transfer of bigger amount, maximum up to RM499,999.99. It is a special computer as it is linked directly to Maybank;

(n) access to that special computer is only by him, SP6 and SP4 and *Pengurus Besar Operasi Kewangan* one Encik Zulkifili Ahmad;

(o) the computer has limited use, only for viewing balance in the account of TSSB and to create a notice of transfer to Astro. Access to it was via a password;

(p) he explained that *Sistem Rentas* is managed and supervised by the technical or IT department at TSSB. The IT department is the sales administrator and anyone who wishes to enter another account into the system, shall obtain approval from the *Ketua Bahagian Sales* and *Ketua Bahagian IT* or *Teknikal*;

(q) since the year 2007, there are only two accounts in the *Sistem Rentas,* which is Astro and Celcom. Transfer to any other account, would be rejected by the system. Thus, his account and wife's account are definitely not included into the system. Those accounts were also unrelated to the process of transfer of funds. It has also got no link or nexus with the alleged transactions as specified in the preferred charges against him;

(r) according to him, when he auto printed the notice of transfer, the system would generate a random seven digit number which would be noted on the said notice of transfer;

(s) for the said notice of transfer, the *sistem rentas* pre-sets two accounts, and automatically the Astro account would be chosen. He would enter the amount to be transferred and the notice of transfer would be generated. The Maybank letterhead would also be automatically generated from the *sistem rentas*;

(t) thereon a number would be generated which is applicable for the account stated on the notice of transfer;

(u) the number is used by him in order to obtain approval so that the transfer of funds take effect;

(v) the number would be taken to the 'approver' SP4 from TSSB, who is authorised by Maybank;

(w) *he maintains that he is not an 'approver'*. This stands unrefuted by the prosecution all along the case;

(x) the role of an 'approver' is for transfer of funds to take effect, otherwise the said transfer would not take place;

(y) the document which would be taken to the 'approver' is the whole of D82 save for the last page;

(z) SP4 would then check the document, if she agrees, a token or device in the form of a pager would be generated. Each of the device contains a password specific to the holder. SP4 would activate the token and enter the seven digit number provided by him. The said token would then generate a seven digit number too;

(aa) he would then go back to his special computer and enter the said seven digit number given by SP4 which would be shown on the screen. The system would then show if the transfer of funds has been approved or otherwise;

(ab) any form of amendment to the account number, would not be allowed by the system, as there would be a prompt to reject the transaction;

(ac) any alteration or amendment cannot take place, unless the entire process is restarted.

(ad) it is confirmed by him that he was never the 'approver'. He did not receive any device or token to be in his possession;

(ae) he was aware of monies into his account which does not correspond with the transactions which he had undertaken;

(af) he did not transfer the monies into his own account and he does not know the source of those funds. But he had used the monies for his own consumption;

(ag) he maintains that pursuant to the strict security available and used by TSSB, there is no way for transfer of funds into his own account, which is an account additional to the Astro account;

(ah) his account number and his wife's are only in possession of the Human Resource, and definitely not in the work process he was involved with;

(ai) when cross-examined, he did not agree to the assertion that when SP5 was transferred, he took over the token and that he does not know if SP5 had returned the token to TSSB before her transfer;

(aj) the practice at TSSB is if there is a transfer of personnel, the device would be returned to Maybank;

(ak) when re-examined, he maintained that the transfer of funds into his own account cannot be made. He only operates the desktop *rentas* to check balance and propose the transfer to Astro for the approver to approve;

(al) for the notice of transfer to take place, the approval of the 'approver' is needed and he was never the 'approver';

(am) the *sistem rentas* pre-sets the account to which the fund could be transferred. Any other transfer would have necessitated approval from the IT department;

(an) he was *not entrusted with* nor *dominion* over the funds or monies belonging to TSSB or the funds or monies due to Astro;

(ao) only the approver had the authority to manage the funds outgoing to the Astro account; and

(ap) he was never made the approver. His name as approver, found on the resolution was never sent to Maybank for approval. He was also unaware of any movement of token device at his office at TSSB.

WAS HIS EXPLANATION A BARE DENIAL?

[18] Explanation by the accused does not turn out as bare denial, since it is his unrefuted testimonial evidence, premised on the process and procedure pertaining mode and manner of transfer of funds to Astro account with strict adherence to the set work process and procedure. It is supposed to be 'online proof' as transfer of funds from TSSB to any other account could not take place without the prior sanction of the IT department at TSSB.

[19] Siti Zabidah bt Ayob was the preparer and the accused, only the checker. SP4 was the authoriser at the relevant time of transaction. The accused was never the approver and the resolution naming him as one, was left in abeyance and not sent for approval by Maybank. Exhibit D80 does not name him as the authoriser. Without being an authorised person, SD1 was not in a position to have in his possession the device and password to have access in order to carry out the alleged transactions, that had taken place, allegedly pin-pointed to him. Thus, in fact there was no entrustment of funds or monies belonging to TSSB which was meant for Astro, to him by way of trust.

WAS THERE ENTRUSTMENT?

[20] It is undisputed that accused was the employee of TSSB. But was he a clerk or servant at the material time, being in a managerial position? The prosecution was unsure, thus no mention of it in the preferred charges.

[21] But in that capacity, was he entrusted with the property of TSSB or

dominion over it was not proven at all by the prosecution against the accused. Hence, the acquittal by SCJ1 at the first instance and affirmed by the HCJ but the COA felt otherwise, but both me and SCJ2 do not have the benefit of their reasoning. So, it is taken, defence was ordered to be entered, on the basis that a prima facie case was established, as alluded to earlier in this judgment.

[22] The preferred charges only states *diamanahkan dengan harta iaitu wang milik syarikat.* The fact that the accused had denied transferring funds to his own account syncs with the case of the prosecution, as it has not been proved by the prosecution that the accused person had received the monies forming the alleged transactions in the preferred charges. That would render the accused not criminally culpable, lest to be to be found guilty of the alleged offences of CBT. The stark fact remains that the accused was never entrusted with the impugned property of the company he hails from, TSSB. Entrustment being the primary ingredient for an offence of CBT and the legal condition to be fulfilled before an offence of CBT is constituted, is not proven beyond reasonable doubt by the prosecution.

[23] Since the accused person was not the approver nor signatory to the funds of TSSB due to Astro account at the desktop banking, as the ultimate approver was SP4, he was not entrusted with the impugned property of TSSB or dominion over it. He was not in the position of disposing of the property belonging to TSSB due to Astro to himself and his wife (see: *Tan Liang Chew & Ors v Public Prosecutor* [1997] 5 MLJ 338). In the ultimate analysis, the accused was merely an employee of TSSB who was assigned the duty to carry out the process of transfer of monies from TSSB to Astro, and his work process is subjected to the approval by SP4, who was the approver responsible for the transfer of funds from the account of TSSB to Astro. Being entrusted with doing a job is not the same thing as being entrusted with any property even though some money or other property may come into his hand in the course of doing his job. On that score it was found in the case of *Puspa Kumar Rai v State of Sikkim* [1978] Cri LJ 1379, which is persuasive, but only biting that there was no material on the basis on which the accused could be charged of criminal breach of trust. It is also so in the present case against the accused.

[24] SP4 had confirmed in her testimony that she is the approver of the transfer of funds into the Astro account and not the accused. He was merely a preparer of the requisite documents together with the random account number to be given to SP4. Her testimony was confirmed by SP6, who testified that the accused, by way of the work process is referred to as the checker. The accused had said the same in his testimony, thus showing consistency. He had maintained, he was not the approver, not given the token device from Maybank (also confirmed by documentary exhs D80 to D89) and he did not approve any of the monetary transaction, including that specified in the preferred charges

against him. Therefore, it is unrefuted by prosecution that the accused was never the approver for the desktop banking transaction, pertaining transactions referred to in the preferred charges against him.

[25] It has to be noted that SP6 as part of the work process would extract from the TSSB system all bills paid at each and every TM point. The data will then be converted into an excel format. A 'cover letter' will then be issued, which would contain the date and time of transaction and amount need to be transferred. The said document prepared is akin to D82. Missing in the narrative of the prosecution is a similar document like D82 as proof for each of the four preferred charges, leaving behind a gaping gap in the case of prosecution. Would the missing link be favourable to the accused, hence a deliberate attempt by the prosecution not to have produced it as tangible proof o support its case against the accused? Its non-production would in law invite an invocation of an adverse inference pursuant to s 114(g) of the Evidence Act 1950 ('the EA'/Act 56). This is simply because, production of that documentary evidence would afford proof of the charges (albeit improperly framed) against the accused vis a vis the alleged transactions pin-pointed to him, which forms the gravamen of the charges, being the most serious part of the accusation against the accused.

ERRORS IN THE FACT-FINDING PROCESS BY SCJ2

[26] When SCJ2 found the accused guilty on all the four preferred charges for offences under s 408 of the PC, her bases are the following:

(a) when defence was ordered to be called by the COA, all ingredients of the offences under s 408 of the PC as per the preferred charges had been fulfilled;

(b) the accused had admitted that on the dates stipulated in the charges he was holding position as the *Penolong Pengurus Pengurusan Stok* at TSSB;

(c) he had carried out his special role to transfer collections received from Astro customers at TM Point to the Astro account of TSSB. This according to SCJ2 has fulfilled the ingredient of the first element of the charge which is, status and position of the accused as an employee or servant of TSSB;

(d) although the accused was not given a token as approver for movement of the monies or funds, she agreed with the prosecution of the fact that although he was not the approver for the transaction carried out via *Sistem Rentas,* prevailing at TSSB, it has not the effect of rebutting the presumption that the accused was involved in the crime alleged against him;

(e) it was found such, as there is overwhelming evidence, unrefuted

demonstrating transfer of monies made by the accused, being subject matter of the preferred charges, into his account and his wife's account as found in exhs P5, P6 to P65, P78 and P81, not denied by the accused nor doubted by him to have moved into his account and he had in fact utilised the said monies for his personal use, among others to service the MARA loan he had taken for himself and his wife;

(f) all of these, according to her, points to conclusive proof on his involvement in approving and transferring monies into his account;

(g) explanation by the accused that transfer of monies was made by another individual is found to be unacceptable, as it was decided, even if it is true, the accused ought to have checked with the bank or lodged a police report on the error in transfer of funds into his account. As such, his explanation does not raise a reasonable doubt on the case of prosecution and that it was only a bare denial;
(At this juncture, it is iterated that this finding is only appropriate if the offence deliberated on is CMP and not CBT, as the offence of CBT is predicated by other requisite ingredients, alluded to above, which are not fulfilled in this case.)

(h) also, explanation by the accused that transfer of monies to accounts other than the account of Astro and Celcom via *Sistem Rentas* at TSSB (including his personal account and his wife's) cannot be undertaken by him as an addition, as it could only be made with the approval of *Ketua Bahagian Kewangan* and *Ketua IT.* It was not accepted as an explanation or defence that has the effect of dislodging the case of prosecution, as there are no witnesses from TSSB called by the accused to prove and support the said defence;
(This clearly demonstrates the error of law committed by SCJ2, when she had imposed a legal burden on the accused to prove his defence, when the law only expects the accused to raise a reasonable doubt on the case of prosecution and/or his guilt.)

(i) to conclude, premised on the defence advanced by the accused, via his testimony, that he was not undertaking the role as an approver and he was not at all involved in the transaction involving transfer of funds via *Sistem Rentas* at TSSB was not believed per se, as it does not raise a reasonable doubt on the case of prosecution and/or his guilt.
(This again is a misdirection as SCJ2 ought to have embarked on this finding only after having assessed and evaluated the testimony of accused as against the proffered evidence by the prosecution, and not to merely arrive at the conclusion which she did, by merely saying a reasonable doubt had not been raised, without paying heed to the evidence in its entirety, and specifically the preferred charges against the accused).

[27] It is apparent, when SCJ2 arrived at the above findings and conclusion,

after rejecting the explanation and defence of the accused, she did not pay heed to the testimony of prosecution witnesses. But she had instead, found feebly that *hasil penelitian ke atas keseluruhan keterangan yang ada, berpuas hati bahawa pihak pendakwa telah membuktikan kes.*

[28] Thus, on a curial scrutiny of the record of evidence in its entirety, it is my finding that, if only SCJ2 embarked on a maximum evaluation of *all* evidence at the conclusion of trial, pursuant to s 173(m)(i) of the CPC, and juxtaposing the defence case with the proffered evidence by the prosecution, she would have arrived at a finding, that ingredients of the offence of CBT pursuant to s 408 of the PC alleged to have been committed by the accused was not proven, ensuing an acquittal of the accused.

FINDINGS AND CONCLUSION

[29] In the preferred charges against the accused, the mode by which the alleged offence of CBT was committed is not stipulated. It was also not disclosed by the evidence tendered in the case by the prosecution.

[30] The charges being foundation of the case and trial involving the accused are incomplete, as the mens rea of the offence committed as well as the requisite actus reus of the offence are not specified. The mode of entrustment, which is a material ingredient of an offence of CBT and also a legal condition to be fulfilled is not specified and the manner in which he was entrusted with the impugned property in his capacity as a clerk or servant, pursuant to s 408 of the PC is also unfulfilled both in terms of the charges and evidence. It is settled law that in proving the offence of CBT under s 408 of the PC, it is mandatory for the prosecution to prove beyond reasonable doubt three principal ingredients, which are entrustment or dominion, the misappropriation and finally dishonest intention. All these three ingredients must be present and proven before the accused could be convicted of CBT. It is also trite law that without dishonest intention a misappropriation or conversion cannot amount to CBT. It too cannot be denied that dishonest intention cannot be proved by tangible evidence and has to be inferred from the facts and evidence tendered. In the present case, the preferred charges itself does not disclose that the accused was actuated by dishonest intention when committing the alleged offences of CBT as for the transactions specified.

[31] The accused has been consistent and he has maintained his position vis a vis the process of his work, that as he was not the approver of funds transfer, thus he was not entrusted with the property of TSSB, turning the case of the prosecution awry. Concomitantly, in the absence of salient stipulations in the preferred charges against the accused, as discussed above, he was prejudiced, as left unable to answer them adequately to negate the principal ingredient of the

offence of CBT, that he was not the person who was entrusted with the alleged impugned property or dominion over it.

[32] The preferred charges lack foundation in law and unsupported by credible evidence by prosecution. SCJ2 who heard the defence of the accused did not properly evaluate the evidence of the accused and juxtapose it with the body of evidence tendered by the prosecution, which in fact supports the explanation given by the accused under oath. SCJ2 had erred in fact and law when she did not re-evaluate the evidence led by the prosecution when finding the accused guilty and convicting him. Further in law, as required, she did not embark on a maximum evaluation of the evidence of defence and test it against the evidence tendered by prosecution.

[33] Considering the evidence led by prosecution and the accused and juxtaposing it against the charges preferred against him, the only logical conclusions that could be arrived at by SCJ2 are as follows:

(a) as the offences charged are CBT, proof of the primary ingredient of entrustment is lacking. Since it is missing, the offence of CBT is not constituted (see: *VR Dalal & Ors v Yougendra Naranji Thakkar & Anr* (2008) 15 SCC 625; *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* [2021] MLJU 2485; [2022] 1 CLJ 491 (CA));

(b) there has also been no proof of the mental element requisite for the offence of CBT, which is the intention to cause wrongful loss or wrongful gain as per the transactions revealed in the preferred charges;

(c) there has been no tangible proof on the dealing by the accused in his capacity as a clerk or servant or employed as such by TSSB, and his nexus with the transactions referred to in the preferred charges pertaining transfer of monies into his own account and his wife's. The transactions referred to and the monies that went into his own account or his wife is distinct and unrelated;

(d) the mode and manner by which the accused had allegedly committed CBT is also lacking, as the requisite actus reus as required under s 405 of the Penal Code is not stipulated in the charges preferred against the accused person and it is also not demonstrated by credible evidence; and

(e) thus, the prosecution had failed to prove a case beyond reasonable doubt against the accused person on all the charges, which are flawed per se.

[34] On the other end of the pole, the testimony of the accused reveals the following:

(a) that he is only involved in the work process pertaining transfer of funds or monies into Astro account;

(b) he is not allowed to transfer funds into his own account or another account as any change or alteration is controlled by the department of IT;

(c) transfer to another account has to be approved by the IT department;

(d) he is for all intents and purposes, only a checker;

(e) he was never the approver of funds or monies transfer into the Astro account;

(f) the approver was SP4 and not the accused;

(g) monies which were transmitted into his account are not monies pursuant to transactions forming the subject matter of the charges against the him;

(h) those monies are admitted not to belong to the accused, but it casually came into his account and stayed there, which was later used up by the accused for his own benefit;

(i) on entrustment, the accused was entrusted with only the work process involving transfer of funds into the Astro account, and not the monies or funds of TSSB;

(j) he was never entrusted with the monies or property of TSSB;

(k) in fact, and in law the approver is so entrusted, not the accused. For s 408 of the PC to bite, there must be evidence that the entrustment was made to the accused in his capacity as an employee or servant of TSSB. (See also *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557 at p 571);

(l) dishonest intention to cause wrongful loss to TSSB, thus gaining wrongfully was not proven by the prosecution;

(m) the alleged gain by the accused into his personal account, is not shown beyond doubt to have emanated from the transactions specified in the preferred charges against him;

(n) the manner as to how the offence of CBT was committed by the accused is not stipulated in the charges. As it is not stipulated, there is also no evidence tendered to prove any one of the mode or manner, which forms the *actus reus* of the offence. SCJ2 ought to have been mindful that the offence of CBT is not an offence of strict liability. It is only an offence under the PC, to convert, dispose or to appropriate property if it is done with a dishonest intention, which constituted the mens rea of the offence. In terms of the law, s 409B of the PC is also inapplicable to the present case, as in the absence of actus reus both in the preferred charges and the proffered evidence by prosecution, the mens rea of dishonest intention on the part of the accused shall not be presumed;

(o) the explanation offered by the accused on oath, is also consistent with the prosecution narrative. Importantly and to reiterate, he is not entrusted with the property or monies of TSSB, as he was not the approver, who approves transfer of monies into the Astro account;

(p) SCJ2 did not at all consider the said consistency. She has ridden roughshod over the case of prosecution;

(q) she did not consider the defence advanced by the accused with that of the prosecution;

(r) by juxtaposing the consistency of explanation by accused with the prosecution narrative, there exists a reasonable doubt both on the case of prosecution and guilt of the accused which was anchored on flawed charges;

(s) his guilt was in fact negated by his explanation under oath, also supported by the witnesses for the prosecution who had confirmed the accused was never the approver of the monies or funds;

(t) SCJ2 had formed her mind to convict the accused on the plank that the monies had entered into his account and his wife's without probing further that the said monies do not form the transactions which are stipulated as subject matter of the preferred charges;

(u) that again amounts to a misdirection which has prejudiced the accused a great deal occasioning a failure of justice;

(v) she did not consider the defence of the accused against the preferred charges against him, which lacks in material particulars on the following aspects:

(i) entrustment or dominion and its mode;

(ii) manner of commission of the offence of CBT, any one of the five modes stipulated by law;

(iii) dishonest use of the impugned property of TSSB not specified; and

(iv) in all, the preferred charges lack the vital elements of actus reus and mens rea constituting a crime of CBT alleged against him.

(w) by not embarking on the above, SCJ2 has misdirected herself on the facts, circumstances of the case and the law applicable; and

(x) yet, she had found the accused guilty, convicted and sentenced him.

Thus, in sum total, the conviction is found to be unsafe, but erroneously made. This finding is fortified by the commentary on s 408 of the PC by *Ratanlal & Dhirajlal, Law of Crimes* (29th Ed, 2023) at p 3141, which renders the

following:

> Burden of proof — The burden of proof of entrustment is on the prosecution. Where the accused was charged with criminal breach of trust, the case of the prosecution being that he had realised certain sums of money on behalf of his master but did not actually credit the same in the master's books and the defence of the accused was that he had done so, *but the accused was convicted as he did not adduce evidence to prove the payment*. It was held that the case was dealt with on an erroneous point of view and that it was the duty of the prosecution to prove that the accused had not in fact made the payments (*Bolai Chandra Khara v Bishnu Bejoy Srimani* (1934) 35 Cri LJ 715 (Cal). (Emphasis added.)

[35] It is an accepted tenet in the rule of law that this court exercising its appellate jurisdiction has no right to disturb the findings of fact by the trial judge. This is because the decision of the SCJ was based on the testimonial evidence before her and as such it ought not be disturbed. But that is the general proposition of the law with exceptions. It being, this court is empowered to interfere and must so interfere if the findings of fact made by the trial judge suffer from infirmities, including serious error or the decision is against the weight of evidence. So, it is the duty of this court to be a judge of fact as well as law and it would be abrogating its functions if it made a hard and fast rule never to interfere with the findings of fact and felt bound to support a judgment which, on a review of all the evidence, is clearly wrong or against the weight of evidence. It is in that light this appeal before me is considered. The basis of my decision is in fact a reconsideration of the facts and evidence presented in its entirety before SCJ2 who has erred in not appreciating it adequately (see authorities like: *Chia Han Kiat v Rex* [1937] 1 MLJ 261; *Goh Ah San & Ors v R* [1938] MLJ 95; *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 38).

[36] In the upshot, I find that there has been insufficient judicial appreciation of the evidence of facts and circumstances placed before SCJ2. She had completely overlooked the stark fact that the course of events did not occur in the manner she had evaluated the evidence of the defence, as she did not juxtapose it with the evidence of the prosecution. In that respect, there has been a flawed reasoning by her springing from the established facts and evidence tendered by both the prosecution and defence. She has also fundamentally misdirected herself when she had erred in not scrutinising the charges preferred and consider it carefully in terms of the law pertaining an offence of CBT, but instead went ahead to conclude it does correspond with ss 405 and 408 of the PC. However so, it remains a fact that the requisite provisions of the CPC, as specifically discussed above, including s 154 has not been complied with, in order for the accused to understand the accusations against him and to explain the preferred charges against him and afford an answer. Notwithstanding the plausible explanation given by the accused which

is supported by testimony of the prosecution witnesses, creating a reasonable doubt both on the case of prosecution and his guilt, SCJ2 found otherwise. Considering his explanation, I find that the accused has discharged the onus placed on him, to have raised a reasonable doubt. It is glaring that SCJ2 did not pay heed to the presumption of innocence which operates in favour of the accused and that he is entitled to the benefit of any doubt, which remains overwhelming in the present case.

[37] In sum total, resulting from the infirmities in the findings by SCJ2, miscarriage of justice has occasioned which has to be corrected by this court, hence the appellate intervention. Ensuing from that, the finding of guilty made, conviction entered against the accused and sentence meted out on him is set aside and the accused is acquitted and discharged of the charges against him. Following from that, appeal by the prosecution/appellant against the sentence meted out on the accused/respondent is also dismissed.

Appeal allowed. Accused acquitted and discharged.

Appeal by accused allowed and appeal by prosecution dismissed; accused acquitted and discharged.

Reported by K Selvaraju